APPENDIX

NOTE OF ARGUMENT AND MEMORANDUM OF AUTHORITIES SUBMITTED BY COUNSEL FOR APPELLANT ON APPLICATION FOR APPEAL AND SUPERSEDEAS BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

This Order Received This the 9th day of June, 1967.
R. E. LEE TAYLOR, Clerk.

State of West Virginia:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of June, 1967, the following order was made and entered, to-wit:

West Virginia Board of Dental Examiners, et al.,
vs.
Harry C. Devore

On a former day, to-wit, May 10, 1967, came the petitioner, Harry C. Devore, by J. J. N. Quinlan and H. G. Williamson, his attorneys, and presented to the Court his petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Cabell County rendered in this action on the 23rd day of September, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is refused.
Judge Browning absent.
A True Copy

Attest: KENNETH E. HINES.
Clerk Supreme Court of Appeals

Entered, Circuit Court Civil Order Book No. 10, page 522, this 9th day of June, 1967.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA BOARD OF DENTAL EXAMINERS, AND EDWARD J. JOSEPH, J. J. HERLIHY, WILLIAM I. BAKER, A. BROOKS DRAKE, AND LAWRENCE FANTI, Members of the West Virginia Board of Dental Examiners, *Plaintiffs*,

vs. :: In Chancery No. 740

HARRY C. DEVORE, *Defendant*.

NOTE OF ARGUMENT AND MEMORANDUM OF AUTHORITIES

To the Honorables, the Judges of the Supreme Court of Appeals:

Your petitioner, Harry C. Devore, would respectfully represent unto this Honorable Court that he is aggrieved by a final order made and entered on the 23rd day of September, 1966, by the Circuit Court of Cabell County, West Virginia.

Such portion of the original record as will adequately present the errors complained of, properly certified, is herewith presented and therefrom it will appear that the case is as follows:

ACTION AND PROCEEDINGS

An August 4, 1958, the plaintiffs, West Virginia Board of Dental Examiners and the predecessor members of said

board filed their amended and supplemental bill of complaint in the Circuit Court of Cabell County, West Virginia, after a previous bill of complaint had been held insufficient on demurrer by said Court, wherein, after recitation of jurisdictional facts and powers and duties of the plaintiffs, together with allegations of purported misconduct of the defendant under certain acts of the West Virginia Legislature therein cited, plaintiffs prayed for a temporary and permanent injunction enjoining, restraining and inhibiting your petitioner "from doing any acts constituting the practice of dentistry or of dental hygiene within the State of West Virginia without prior licensing by the West Virginia Board of Dental Examiners x x x". After hearing upon a companion case, which the parties, by counsel, agreed would control the present case the Circuit Court of Cabell County on the 6th day of October, 1958, caused to be entered an order perpetually enjoining your petitioner "from doing any act or acts, directly or indirectly, within the State of West Virginia constituting the practice of dentistry or the practice of dental hygiene as defined by statute without having first been licensed thereto by the West Virginia Board of Dental Examiners or a successor body".

On the 4th day of August, 1966, the successor board and its constituent members caused to be filed in the Circuit Court of Cabell County, West Virginia, their petition alleging that the defendant refused entry and inspection of defendant's premises by a member of the dental board under Code, 30-4-4a which was amended by the Legislature by Chapter 108 of its Acts which added the following language:

> "The board, acting by and through its members, employees, and agents, is further authorized and empowered, at any time during customary office

hours, to enter into the office or place of business of any dental laboratory, licensed dentist or other dental practitioner of this State, and to obtain access to, make inspection of, and request information regarding any work authorization which such dental laboratory, licensed dentist, or other dental practitioner is required under the provisions of section two-a of this article, to retain therein, and is further authorized and empowered to inspect any items of dental technological work then in the course of performance of such dental laboratory or person employed by it, and to inspect any dental prosthesis then in the place of business of, or upon the premises occupied by, such dental laboratory for making, production, reproduction, construction, repair, alteration, or restoration, and to request any information which it, its members, employees, or agents deem to be pertinent relating to any such dental technological work and any such dental prosthesis. For the purpose of this paragraph the definition of terms contained in subsection A of section two-a of this article is made expressly applicable."

The petition further alleged certain matters upon which no evidence was adduced or sought to be adduced, but on the contrary the Court permitted certain other evidence to be introduced, at the conclusion of which the Court sustained defendant's counsel's motion to strike. However, in spite of the fact that no evidence whatsoever was introduced to show a violation of the injunction, the Court permitted an amendment to the 1958 order permitting inspection of your petitioner's premises in the language of the statute above quoted. It is of this arbitrary action of the lower court that your petitioner complains.

POINTS AND AUTHORITIES

1. The action of the Circuit Court violates the mandate of the Constitution of the United States and the State of West Virginia in permitting an unreasonable search.

U. S. Constitution, Amendment 4.

W. Va. Constitution, Article 3, Section 6.

District of Columbia v. *Little*,
178 F. 2d 13, 13 ALR 2d 954;

Boyd v. *U. S.*,
116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746;

State v. *Andrews*,
91 W. Va. 720, 114 S. E. 257;

State v. *Massie*,
95 W. Va. 233, 120 S. E. 514.

2. The action of the Circuit Court violates the provisions of the Constitution of West Virginia as depriving the defendant of his rights without due process of law.

W. Va. Constitution, Article 3, Section 10.

Floyd v. *C. & O. Ry. Co.*,
112 W. Va. 66, 164 S. E. 28;

Peerce v. *Kitzmiller*,
19 W. Va. 564.

ARGUMENT

The defendant strenuously objects to the order of the Circuit Court on the grounds set forth above, for it seems a palpable disregard of fundamental safeguards set up by the people themselves, from whom all governmental power is derived, to protect themselves from the inroads of tyranny.

A case much in point with the action sought to be taken here is *District of Columbia* v. *Little*, 178 F. 2d 13, 13 ALR 2d 954. In that case upon a complaint a health inspector of the District of Columbia, without first obtaining a warrant, but under authority of a health regulation (based upon Acts of Congress), demanded to search the premises of the defendant. The demand was refused, and the defendant was arrested, tried and convicted upon an information charging her with hindering, obstructing and interfering with the inspector in the performance of his duty. The following appears in the Court's language:

> "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.
>
> The argument involves a basic error in reasoning in respect to the Constitution's Bill of Rights. The Fourth Amendment did not confer a right upon the people. It was a precautionery statement of a lack of federal governmental power, coupled with a rigidly restricted permission to invade the existing right. The right guaranteed was a right already belonging to the people. The reason for the search warrant clause was that public interest required that personal privacy be invadable for the detection of crime, and the amendment provided the sole and only permissible process by which the right of privacy could be invaded. To view the Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon
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> Much of the argument of the District is devoted to establishing the public importance of the health laws. Assertions are also made of the beneficience and for-

bearance of health officers. We may assume both propositions. But the constitutional guarantee is not restricted to unimportant statues and regulations or to malevolent and arrogant agents. Even for the most important laws and even for the wisest and most benign officials a search warrant must be had. x x x Distinction between inspection and search of a home has no basis in sematics, in constitutional history, or in reason. 'Inspect' means to look at, and 'search' means to look for. To say that the people in requiring the adoption of the Fourth Amendment, meant to restrict invasion of their homes if governmental officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

In *Boyd* v. *United States*, 116 U. S. 616, 6 St. Ct. 524, 29 L. Ed. 746, a landmark in the law of searches and seizures, it was said:

"In order to ascertain the nature of the proceeding intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures', it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an

English law book', since they placed 'the liberty of every man in the hands of every petty officer.'"

Counsel for defendant find it difficult to distinguish between the ancient and well detested writ of assistance and the order entered by the Circuit Court of Cabell County upon a petition entirely unsupported by a scintilla of evidence; the effect of each is the same.

There is a further objection to the ruling of the Circuit Court, in that a reading of the testimony adduced in support of the petition will show that it is devoid entirely of any proof of wrongdoing on the part of the defendant. The entry of the order complained of was therefore in contravention of Article 3, Section 10 of the Constitution of West Virginia. "Due process of law", as counsel understands it, means observance of those rules and forms which have been established in legal procedure for the protection of private rights. *Floyd* v. *C. & O. Ry. Co.*, 112 W. Va. 66, 164 S. E. 28; *Peerce* v. *Kitzmiller*, 19 W. Va. 564. It seems fundamental that such procedure requires some basis for a Court's finding, and if the record is absolutely devoid of such basis, an order depriving a citizen of liberty or property cannot stand in face of this organic provision.

It is, therefore, respectfully submitted that the order of the Circuit Court entered on the 23rd day of September, 1966 should be set aside and held for naught.

Respectfully submitted,

H. G. WILLIAMSON

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